BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of Qwest's Wholesale Service Quality Standards

ISSUE DATE: July 3, 2003

DOCKET NO. P-421/AM-00-849

ORDER ADOPTING WHOLESALE SERVICE QUALITY STANDARDS

PROCEDURAL HISTORY

On June 28, 2000, the Commission initiated this case to develop service quality standards for wholesale transactions between U S WEST Communications, Inc. (U S WEST) and competitive local exchange carriers (CLECs). CLECs buy U S WEST's services to resell to their customers, and buy U S WEST's network elements to incorporate into their own finished retail services. As a condition of approving the merger of U S WEST and Qwest Corporation, the combined entity (Qwest) agreed to "participate and cooperate in an expedited proceeding to establish permanent wholesale service quality standards."[1]

Over the course of two years of proceeding and hearings, a coalition of entities[2] (the Coalition) developed proposed wholesale service quality standards. The proposal would have, among other things, required Qwest to make penalty payments to the state, as well as payments to affected CLECs for each failure to meet a standard.

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[1] See *In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc. and U S WEST Communications, Inc.*, Docket No. P-3009, 3052, 5096, 421, 3017/PA-99-1192, ORDER ACCEPTING SETTLEMENT AGREEMENTS AND APPROVING MERGER SUBJECT TO CONDITIONS (June 28, 2000), citing Stipulation and Agreement Between U S WEST, Qwest, the Minnesota Department of Commerce and the Minnesota Office of the Attorney General. The quoted language appears at § VII(A) of the stipulation.

[2] The Coalition consists of the Department of Commerce; Office of the Attorney General's Residential and Small Business Utilities Division (OAG-RUD); AT&T Communications of the Midwest, Inc.; Covad Communications Company; Encore Communications L.L.C.; Eschelon Telecom of Minnesota Inc.; Global Crossing Local Services, Inc.; McLeodUSA, Inc.; New Edge Networks, Inc.; Northstar Access, L.L.C.; Onvoy Inc.; Rhythms Links, Inc. (Rhythms); Time Warner Telecom of Minnesota, LLC; US Link and WorldCom, Inc.

On July 29, 2002, in a docket addressing Qwest's application to enter the interLATA long-distance market in Minnesota, the Commission provisionally approved a Performance Assurance Plan (PAP) with terms identical to the PAP adopted in Colorado (the CPAP).[3]

On August 2, 2002, the Commission asked the parties in the current docket to comment on the merits of adopting a state wholesale service quality plan based on the CPAP. The Commission postponed further proceedings in this docket, stating that Commission deliberations would be informed by the analysis and selection of a PAP for Qwest. At a meeting on September 19, 2002, the Commission approved a PAP for Qwest.[4]

On October 21, 2002, in response to the Commission's request, the Coalition abandoned its earlier proposal and set forth a new proposal based on the PAP with modifications.

On the same day, Qwest filed comments stating that it would support the use of the PAP's measurements and standards as Minnesota's wholesale service quality standards. But Qwest opposed the use of the PAP's payment regime in connection with such standards.

On November 12, 2002, the Coalition and Qwest filed reply comments opposing each other's proposals.

On November 19, 2002, in response to a Commission directive in a separate docket,[5] Qwest proposed certain wholesale service quality standards including some of the benchmarks proposed by the Coalition and incorporating many of the Coalition's payments linked to the benchmarks. But when the Commission declined Qwest's proposal, Qwest withdrew its offer.

On January 31, 2003, Qwest filed comments on efforts by Coalition members to accommodate Qwest's concerns with the Coalition proposal.

On March 19, 2003, Qwest filed a statement indicating Qwest's desire to have the PAP serve as the state's wholesale service quality plan.

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[3] *In the Matter of Qwest's Performance Assurance Plan*, Docket No. P-421/AM-01-1376 (PAP Docket), ORDER ADOPTING PLAN AND SETTING PROCEDURAL SCHEDULE (July 29, 2002).

[4] The order was memorialized in the PAP Docket, ORDER ON RECONSIDERATION AMENDING PERFORMANCE ASSURANCE PLAN (November 26, 2002). The PAP became effective on June 26, 2003; see *In the Matter of Qwest Communications International, Inc. for Authorization to provide in-region, interLATA services in the State of Minnesota*, WC Docket No. 03-90 (FCC's § 271 Docket), Memorandum Opinion and Order (June 26, 2003).

[5] *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements,* Docket No. P-421/C-02-197.

On May 5, 2003, the Coalition[6] modified its proposal to accommodate four concerns raised by Qwest.

The Commission met on May 8, 2003 to consider this matter.

FINDINGS AND CONCLUSIONS

I. Background

This Order is the culmination of a three-year effort to develop a plan for ensuring that wholesale services provided by Qwest to its competitors are of sufficient quality to promote the development of a competitive local telecommunications market.

A decade ago, the need for wholesale service quality standards for telecommunications companies might have seemed incomprehensible. But in the mid-1990s, state and federal law changed to promote competition in the local telecommunications market; see the Minnesota Telecommunications Act of 1995[7] and the federal Telecommunications Act of 1996[8] (the 1996 Act). These laws gave rise to transactions between telecommunications providers for services and "network elements," triggering concerns about the quality of those services and elements. These laws, and the mechanisms the Commission has used to promote service quality, are summarized below.

A. Wholesale telecommunications transactions

The 1996 Act seeks to promote competition in the local exchange telephone market. To this end, the 1996 Act directs an incumbent local telephone company –

- to permit competing firms to interconnect with its system,
- to permit a competitor to purchase services from the incumbent at wholesale rates for resale, and
- to permit a competitor to rent the use of elements of the incumbent's network, unbundled from undesired elements, at "rates, terms and conditions that are just, reasonable and nondiscriminatory...." 47 U.S.C. § 251(c).

[6] OAG-RUD and Rhythms took no part in this filing.

[7] Laws of Minnesota 1995, chapter 156.

[8] Pub. L. No. 104-104, 110 Stat. 56 (codified throughout title 47, United States Code).

A competitor desiring to provide local exchange service may seek agreements with an incumbent related to interconnecting to the incumbent's network, the purchase of finished services for resale, and the purchase of the incumbent's unbundled network elements (UNEs).[9] If the incumbent and the competitor cannot reach agreement, and the state commission may arbitrate the dispute.[10]

Qwest is the largest incumbent local telephone company in Minnesota. While CLECs and Qwest remain free to negotiate their own terms, the Commission has established terms under which CLECs may purchase Qwest's wholesale services[11] and UNEs.[12]

B. Direct Measures of Quality (DMOQs)

Among the UNE terms that the Commission has arbitrated is a kind of wholesale service quality plan called "Direct Measures of Quality" or DMOQ.[13] DMOQs required US WEST Communications, Inc. (US WEST) to make payments to its CLEC customers if US WEST's wholesale services failed to meet specified fixed standards or "benchmarks."[14] As US WEST's successor, Qwest has assumed the DMOQ obligations.

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[9] 47 U.S.C. §§ 251(c), 252(a).

[10] 47 U.S.C. § 252(b).

[11] *In the Matter of a Further Commission Investigation of Avoided Cost Discount of U S WEST Communications (now Qwest)* Docket No. P-999/CI-99-776 ORDER ACCEPTING THE PROPOSED RESOLUTION (February 7, 2000).

[12] See generally *In the Matter of a Generic Investigation of US West Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements,* Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540; *In the Matter of the Commission Review and Investigation of Qwest's Unbundled Network Elements Prices,* Docket No. P-421/CI-01-1375; *In the Matter of the Commission's Review and Investigation of Certain Unbundled Network Element Prices of Qwest,* Docket No. P-442, 421, 3012/M-01-1916.

[13] *In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996,* Docket No. P-421/M-96-855; Docket No. P-5321, 421/M-96-909; P-3167, 421/M-96-729 ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING (December 2, 1996), Interconnection Agreement Attachment 11 (DMOQs).

[14]*The American Heritage Dictionary of the English Language* (4th Ed. 2000) defines a benchmark as –

> A standard by which something can be measured or judged.... A surveyor's mark made on a stationary object of previously determined position and elevation and used as a reference point in tidal observations and surveys.

C. Interim service quality standards

Qwest became US WEST's successor when the two companies merged. As a condition of that merger, Qwest agreed to participate in the current docket to establish a wholesale service quality plan. Additionally, Qwest agreed to certain wholesale service quality benchmarks and payments to be in effect in the interim.[15] Similar to the DMOQs, these interim standards direct Qwest to make payments to CLECs for failure to achieve certain benchmarks of service quality.

D. Section 271

Under the 1996 Act's § 271, a Regional Bell Operating Company (RBOC) such as Qwest may not compete in the interLATA long-distance market[16] until it obtains permission from the Federal Communications Commission (FCC). To gain the FCC's permission the RBOC must demonstrate, among other things, that –

- the RBOC permits competitors to interconnect with its system in a manner that fulfills the 14-point "competitive checklist" standards set forth at 47 U.S.C. § 271(c)(2)(B), and
- the RBOC's entry into the long-distance market would be "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C).

The FCC makes this determination on a state-by-state basis, upon the RBOC's request.

1. The Fourteen-Point Checklist and Performance Indicator Definitions (PIDs)

Qwest is the incumbent local service provider in fourteen states. These states formed a Regional Oversight Committee (ROC) to coordinate regulation. Most of those states, including Minnesota, joined the effort to develop tests for evaluating whether Qwest fulfills the requirements of the 14-point checklist.

As part of this effort, the ROC identified a list of criteria, called performance indicator definitions (PIDs), for determining whether Qwest is fulfilling its obligations under the 14-point checklist. The ROC identified more than 50 PIDs. Some PIDs call for Qwest to treat CLEC customers no

[15] See n.1, *supra*.

[16] The term "LATA" comes from the break-up of American Telephone & Telegraph Co. (A.T.& T.). In 1982 A.T.& T. agreed to settle an antitrust suit by divesting its local telephone business to form the RBOCs, while continuing to provide long-distance service. To implement this change, the settlement defined 196 geographic areas called "local access and transport areas" (LATAs). A RBOC was prohibited from completing a call that crosses LATA boundaries. *United States v. Western Electric*, 552 F.Supp. 131 (D.D.C. 1982), affirmed sub nom. *Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed. 472 (1983). The 1996 Act retains the LATA concept for purposes of defining the limits on a RBOC's provision of long-distance service. 47 U.S.C. §§ 151(25), 271.

worse than Qwest treats its own retail customers ("parity"); other PIDs require Qwest's service to meet specified benchmarks.[17]

2. Public Interest and the Performance Assurance Plan (PAP)

In evaluating whether granting an RBOC's petition is consistent with the public interest, the FCC considers whether the RBOC provides "sufficient assurance that markets will remain open after grant of the application," and "whether a RBOC would continue to satisfy the requirements of section 271 after entering the long distance market."[18] The FCC has relied on post-entry "performance assurance plans" developed collaboratively by the RBOC, competitive carriers, and the states in finding that there are performance monitoring and enforcement mechanisms in place that would, "in combination with other factors, provide strong assurance that the local market will remain open after [the RBOC] receives section 271 authorization."[19]

Having developed PIDs for the purpose of gauging compliance with the 14-point checklist, many states incorporated those same measures into their PAPs.

The Commission developed and approved a performance assurance plan for Qwest.[20] The plan incorporates the ROC's PIDs and a scheme of payments to CLECs and the state for failures to provide wholesale service. Qwest accepted the plan and incorporated it into Qwest's § 271 application to the FCC.[21]

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[17] See, for example, *In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist items 1, 2, 4, 5, 6, 11, 13, and 14,* Qwest's comments (May 29, 2002), incorporating by reference QWEST COMMUNICATIONS OSS EVALUATION FINAL REPORT, VERSION 2.0 (May 28, 2002) at 12; FCC § 271 Docket, Application Appendix B ("Statement of Generally Available Terms"), Exhibit B ("Service Performance Indicators") (March 28, 2003).

[18] Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Service in the State of New York,* 15 FCC Rcd 3953, 4161-62 (1999) at ¶ 429, aff'd, 220 F.3d 607 (D.C. Cir. 2000).

[19] *Id.*

[20] PAP Docket, ORDER ADOPTING PLAN AND SETTING FURTHER PROCEDURAL SCHEDULE (July 29, 2002), ORDER ON RECONSIDERATION AMENDING PERFORMANCE ASSURANCE PLAN (November 26, 2002).

[21] FCC's § 271 Docket, Application Appendix B (Statement of Generally Available Terms), Exhibit K; Appendix E. Revised April 30, 2003, in the PAP Docket, *supra* n.3.

E. Alternative Form of Regulation (AFOR) plans

Finally, while an alternative form of regulation (AFOR) plan need not include wholesale service quality provisions, they typically do include *retail* service quality plans.

An AFOR plan is a means by which a telephone company may negotiate with the Commission to replace standard rate regulation procedures with more flexible pricing procedures. Minn. Stat. §§ 237.76 through 237.772 . As part of an AFOR plan, a company may enter into a *retail* service quality plan, including remedies and payments for failure to maintain service quality at levels specified in the plan. Minn. Stat. § 237.761, subd. 8.

Qwest entered into an AFOR plan in 1999. The plan incorporates a retail service quality plan with benchmarks and payments to injured parties for noncompliance.[22]

II. Qwest's Wholesale Service Quality Plan Proposal

Qwest asks the Commission simply to adopt the PAP as the state wholesale service quality plan. Qwest argues that the PAP provides adequate assurance that it will not discriminate in the provision of wholesale services by offering better service to its own retail operations than it offers to CLECs.

The Coalition argues that the PAP is inadequate as a wholesale service quality plan. While the plan may discourage Qwest from discriminating, it provides Qwest's wholesale customers – the CLECs – with inadequate assurances about the quality of service they will receive. Consequently, the CLECs are undermined in their ability to provide a consistent level of service to their own customers.

Qwest disputes the Coalition's assertions, largely on the grounds that CLECs have no right – and the Commission has no authority – to require Qwest to offer wholesale services on terms other than at parity with the service it provides to its own retail operations. Rather, Qwest argues that the 1996 Act bars the Commission from adopting any service quality standard other than parity.

III. The Coalition's Proposal

The Coalition shares Qwest's support for the PAP, at least as the foundation for a wholesale service quality plan. But unlike Qwest, the Coalition recommends modifying the PAP. Out of more than 50 PIDs defined by the ROC, the Coalition has identified six categories of PIDs that bear on especially sensitive aspects of the CLEC-customer relationship. The Coalition argues that these PIDs warrant benchmarks instead of the simple parity standard. In addition, the Coalition proposes other miscellaneous changes. The Coalition's proposed modifications are as follows:

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[22] *In the Matter of the Petition of U S WEST Communications, Inc. for Approval of its Alternative Form of Regulation Plan*, Amended Alternative Form of Regulation Plan for the State of Minnesota (January 11, 1999) (AFOR plan), Appendix B.

A. Installation commitments and intervals

The "Installation Commitments Met" PID gauges how often Qwest installs services by the scheduled due date. The "Installation Interval" PID gauges Qwest's average time to install a service. There is no benchmark for most elements within these PIDs. The Coalition proposes to change this.

To create a competitive telecommunications marketplace, the Coalition argues that a CLEC must be able to manage its relationship with its customer. The CLEC must be able to offer predictable, timely service to customers, and have that service delivered. A missed delivery date creates an unfavorable first impression. Prompt, timely service is desirable for customers, too. In the case of telecommunications, a late installation may leave a customer without service. Consequently, a CLEC that fails to install service by the promised date often loses its customer, who simply chooses to remain with the incumbent provider.

The Coalition notes that both the DMOQs and the interim wholesale service quality standards established benchmarks for service installation intervals of between 5 and 15 business days depending on the type of order and other circumstances.[23] These interval benchmarks are consistent with Qwest's retail service quality obligations arising from its AFOR plan,[24] and with the STANDARD INTERVAL GUIDE, a document developed by Qwest for its own operations. The Coalition proposes carrying these existing benchmarks over to the new wholesale service quality standards.

Additionally, the Coalition notes that the DMOQs establish a 95% benchmark for meeting wholesale commitments.[25] This is consistent with Qwest's obligation to provide service to its retail customers.[26] Again, the Coalition proposes carrying these existing benchmarks over into the new standards.

Qwest argues that it should be exempted from meeting provisioning standards where it lacks the facilities necessary to fulfill an order. The Coalition generally opposes this view. Neither the DMOQs nor the interim service quality standards provide an exemption for a facility shortage. If they did, the Coalition argues, Qwest could evade its wholesale service obligations simply by maintaining inadequate inventories. Finally, the Coalition observes that Qwest's UNE prices were designed to provide sufficient revenues to finance an adequate inventory of facilities.

But to accommodate some of Qwest's concerns, the Coalition offers the following concession:

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[23] See, for example, Interim Standard M.

[24] AFOR plan Appendix B, pp. 7-8 (installations due within 2-20 days, depending on circumstances).

[25] DMOQs Metric OP-6.

[26] Qwest, as successor to U S WEST, must complete 95% of its retail installations for services (except certain designated services) within two days or on the date requested by the customer, whichever is later. AFOR plan, Appendix B, p. 7.

Where Qwest lacks facilities to fill a CLEC customer's order by the due date, and Qwest had not previously provided service to that customer's location, then the Coalition agrees that any failure to provide service by the due date should not influence the calculation of Qwest's payments to the CLEC. A lack of facilities should not, however, excuse Qwest providing service at less than parity.

B. New service problems

The "New Service Installation Quality" PID gauges how often problems arise within 30 days of service installation. There is no benchmark for most elements within this PID. The Coalition proposes that Qwest make payments to CLECs if problems arise more than 5% of the time.

The rationale for this benchmark is similar to the rationale for the previous one: In order to create a competitive telecommunications marketplace, a CLEC must be able to manage the relationship with its customer. Early failures damage that relationship while it is still tenuous.

Qwest objects to the proposed benchmark, noting that the DMOQs establish a more lenient 10% standard. But the Coalition observes that the DMOQs also require Qwest to make payments to affected customers each time there is a service problem within 30 days of installation. In contrast, the Coalition's proposal would not require any payments until the rate of service quality problems exceeded 5%. The Coalition argues that this is a roughly comparable provision.

C. Jeopardy notices

The "Timely Jeopardy Notices" PID gauges how often, when Qwest fails to meet a deadline, Qwest gives the CLEC advance notice. There is no benchmark for this PID. The Coalition proposes that Qwest provide at least one day's notice 95% of the time.

Again, the Coalition argues that a CLEC must be able to manage its relationship with its customer. If fulfilling an installation commitment is critical to that relationship, informing the customer when that commitment will not be fulfilled is even more critical. Timely notice permits the CLEC to provide the customer – and sometimes the customer's equipment suppliers – with time to make other arrangements. Payments are especially appropriate where, as here, competitive pressures may compel a CLEC to compensate the customer for the delay. The Coalition notes that its proposal is consistent with the AFOR plan's requirement for jeopardy notices.[27]

D. Service repairs

The "Out of Service Cleared within 24 Hours" PID gauges how often Qwest restores a service within 24 hours of receiving a request for repair ("trouble report"). The "All Troubles Cleared within 4 Hours" PID gauges how often Qwest resolves a trouble report concerning a high-capacity line within four hours of receiving the report. There are no benchmarks for these PIDs. The Coalition proposes that Qwest resolve each of these problems within the specified period 95% of the time.

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[27] AFOR plan Appendix B at 3.

The Coalition explains that people do not value phones; they value phone *service*. Access to facilities is unavailing when the facilities don't work. Long outages can damage a customer's view of its phone company, which can damage the development of the telecommunications market. One survey suggests that 78% of customers expect service to be restored within eight hours.[28] According to the Coalition, the harm to a CLEC's reputation from extended outages is incalculable.

The Coalition's proposal would carry existing benchmarks over into the new standards. The DMOQs already require Qwest to restore wholesale service within 24 hours 95% of the time.[29] And the AFOR plan[30] and Minnesota Rules part 7810.5800 require Qwest to restore retail service within 24 hours 95% of the time. For certain high-capacity lines (DS-1s and DS-3s[31]), the AFOR plan imposes an increasing level of payments starting four hours after the outage begins.[32]

Moreover, the AFOR plan requires Qwest to pay the inconvenienced customer each time these timelines are not met. But the Coalition does not ask for this aspect of the AFOR plan to be incorporated into the service quality plan, and merely proposes that payments occur when service quality falls below the 95% benchmark. In this sense, the Coalition's proposal is more lenient than existing standards.

E. Repeated service problems

The "Repair Repeat Report Rate" PID gauges how often problems on a customer's line recur within 30 days of the initial repair. There are no benchmarks for these PIDs. Under the Coalition proposal, Qwest would make payments to CLECs if more than 5% of customers' lines with trouble reports get an additional trouble report within 30 days.

The Coalition argues that this standard complements the other maintenance and repair standards, gauging the extent to which "successfully completed repairs" are actually successful and complete. Of course, a problem can arise on any customer's line, including a line that had been subject to repair within the past 30 days. But if more than 1 in 20 repaired lines develops problems within a month of the repair, that suggests some defect in the quality of the repairs.

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[28] Hearing Transcript Vol. 1 at 117.

[29] DMOQ Attachement 11, MR-4.

[30] AFOR plan Appendix B at 10.

[31] "DS" stands for "digital signal." A standard voice-grade line (labeled DS-0) permits the transmission of 64,000 bits of information per second. A DS-1 line has the capacity of 24 voice-grade lines; DS-3 has the capacity of 672 voice-grade lines. *Newton's Telecom Dictionary*, 17th ed. (2001).

[32] AFOR plan Appendix B at 11-12.

Qwest objects to the Coalition's 5% benchmark, noting that its AFOR plan includes a more lenient 9% benchmark. But the Coalition observes that the AFOR plan requires payments for every instance of a repeat trouble report; the 9% benchmark merely triggers additional payments. In contrast, the Coalition's proposal would not require any payments until the repeat repair rate exceeded 5%. Consequently, the Coalition argues that its proposal is roughly comparable to the AFOR plan's standard.

F. Trunk blocking

The "Trunk Blocking" PID gauges how often the high-capacity connections between a CLEC's office and Qwest's office are blocked, as when the demand for the trunk exceeds its capacity. This PID provides a 1% benchmark under some circumstances, and a parity standard under other circumstances. The Coalition proposes a uniform benchmark, making Qwest pay CLECs whenever the rate of trunk blocking exceeds 1%.

The Coalition's rationale for establishing a benchmark for this PID is similar to its rationale for establishing the "Out of Service Cleared within 24 Hours" benchmark: customers expect their phone service to function, and are likely to blame any malfunction on their telephone company. Trunk blocking keeps a customer from either making or receiving calls.

The Coalition's proposal would carry existing benchmarks over into the new standards. As noted above, the PID already contains a 1% benchmark for some purposes. Also, DMOQs require Qwest to make payments to affected retail customers if trunks are blocked at a rate exceeding 1%. Finally, the Coalition asserts that industry standards are between 1/2% and 1%.[33]

G. Miscellaneous changes

The PAP was developed for the purpose of ensuring that Qwest would not discriminate against CLECs after it had received the FCC's authorization to enter the interLATA long-distance market. To make it serviceable as a wholesale service quality plan, the Coalition proposes the following additional changes.[34]

1. Remedy cap

The Coalition proposed eliminating limits on Qwest's liability under the plan. But as part of an effort to find accommodation with Qwest, the Coalition now proposes reinstating the caps on liability, including a total cap of $100 million per year.

Where billing measures are concerned, however, the Coalition proposes changing the caps. Qwest's reported difficulties in rendering accurate bills to CLECs prompt the Coalition to seek to increase the limit on the monthly base payment per billing measure error from $5,000 to $10,000. Likewise, the Coalition proposes increasing the overall monthly limit on payments for billing measure errors from $30,000 to $50,000 for any duration escalator applied under the plan.

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[33] Coalition comments (October 21, 2002) at 214, 220.

[34] Among other things, the Coalition modifies its proposal to incorporate Commission-approved PAP language acknowledging parties' right to appeal changes made to the plan; this language had not been included in earlier Coalition drafts.

The Coalition alleges that the lower caps on billing errors provide Qwest with a mechanism to manipulate its payments to CLECs. While the plan establishes the magnitude of payments Qwest must make to CLECs for billing errors, the plan leaves Qwest with considerable discretion about when to make these payments. Where monthly caps are low, Qwest has an incentive to pay CLECs for multiple errors all in the same month. By aggregating payments for multiple errors, Qwest can hit the cap, effectively reducing its liability. By increasing the caps, the Coalition hopes to limit Qwest's ability to engage in this practice. The Coalition emphasizes that this change does not increase the schedule of payments set forth in the plan.

Qwest opposes this change, noting that it is inconsistent with the PAP.

2. "Tier 2" fund

The PAP provides for CLECs to elect to be governed by the PAP or a Commission-approved wholesale service quality plan. The PAP also provides for Qwest to make payments into a "Tier 2" fund to be used for administrative purposes, among other things. To forestall any objection that Qwest is being compelled to contribute twice into this Tier 2 fund – once in compliance with the PAP and again in compliance with the wholesale service quality plan – the Coalition proposes removing most references to the fund from the wholesale service quality rules. In their place, the Coalition proposes adding language providing for the Commission to "develop and assess" Tier 2 payments as part of the wholesale service quality plan if the PAP expires.

Qwest also had proposed removing references to Tier 2 payments,[35] although Qwest was receptive to the idea of including them in the service quality plan, too.[36]

3. Duplicative reporting

The Coalition proposes language providing for the Commission to relieve Qwest of the obligation to file information under the service quality plan if that same information is already being filed under the PAP.

4. Limitations on liability

The Coalition proposes re-writing a portion of the PAP to clarify that CLECs may pursue remedies other than those contained in the service quality plan, but that CLECs may not obtain duplicative recovery for the same error.

5. Attorneys fees

The Coalition proposes eliminating language that would require a losing party to pay attorneys fees of the prevailing party for actions brought before the "Independent Monitor." The Coalition argues that this arrangement may inappropriately discourage claims, and that this practice is generally inconsistent with general Commission practice.
Qwest is receptive to this proposal.[37]

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[35] Qwest comments (December 19, 2002).

[36] Qwest comments (January 31, 2003) at 2.

[37] *Id.* at 3.

6. Ministerial changes

The Coalition proposes eliminating PAP language that is inappropriate to a wholesale service quality plan, such as an introduction discussing PAPs and language stating that the plan is voluntarily adopted by Qwest. Qwest is receptive to some of these changes as well.[38]

IV. Commission Analysis

A. Scope of agency discretion

Qwest argues that the Commission lacks the authority to adopt service quality standards that impose a different standard than parity, or that require payments to CLECs. Before turning to the substance of the two proposals, therefore, the Commission will address the scope of the Commission's discretion, including its legal authority to adopt a wholesale service quality plan.

1. Legal authority generally

The Commission's authority is set forth in Minnesota Statutes chapters 216, 216A, 216B and 237. The Commission has various powers, both legislative and quasi-judicial.[39] Establishing service quality standards is an inherently legislative function, relying on the exercise of judgment to balance competing policy considerations.

Minnesota Statutes §§ 216B.23, 237.011, 237.02, 237.03, 237.06, 237.081, 237.082, 237.09, and 237.16, among other statutes, bear on the current topic.[40] The Commission has authority to, among other things, make any just and reasonable order necessary to remedy unreasonable or insufficient services or omissions,[41] up to and including revoking a carrier's authority to provide service.[42]

The Commission's telecommunications objectives are set forth by the Legislature at Minnesota Statutes § 237.011:

> The following are state goals that should be considered as the commission executes its regulatory duties with respect to telecommunication services:

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[38] *Id.* at 3-4 (eliminating reference to the plan's voluntary nature).

[39] Minn. Stat. § 216A.05, subd. 1.

[40] See *In the Matter of Onvoy, Inc.'s Complaint Against Qwest and Request for Expedited Hearing*, Docket No. P-421/C-01-1896 ORDER ON RECONSIDERATION AWARDING INTEREST (December 19, 2002) (accepting administrative law judge conclusion that § 216B.23 authorizes Commission to direct Qwest to pay interest on sums wrongfully withheld from competitor).

[41] Minn. Stat. §§ 216B.23, 237.081.

[42] Minn. Stat. § 237.16, subd. 5.

(1) supporting universal service;
(2) maintaining just and reasonable rates;
(3) encouraging economically efficient deployment of infrastructure for higher speed telecommunication services and greater capacity for voice, video, and data transmission;
(4) encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner;
(5) maintaining or improving quality of service;
(6) promoting customer choice;
(7) ensuring consumer protections are maintained in the transition to a competitive market for local telecommunications service; and
(8) encouraging voluntary resolution of issues between and among competing providers and discouraging litigation.

Clearly service quality standards are relevant to "maintaining or improving quality of service" (Goal 5). Additionally, rates can only be judged just and reasonable if the corresponding services are provided at an established level of quality; therefore, service quality standards promote just and reasonable rates (Goal 2). Moreover, by laying the foundations for competition in the local phone market, service quality standards contribute to "promoting customer choice" (Goal 6) and "encouraging fair and reasonable competition for local exchange telephone service." (Goal 4).

Similarly, the Legislature directs the Commission to "protect against cross-subsidization, unfair competition, and other practices harmful to promoting fair and reasonable competition...."[43] Collectively, these statutes give the Commission broad statutory duties corresponding to its broad statutory authority for regulating telecommunications.

2. Legal authority to adopt a standard other than parity

Qwest asserts that the 1996 Act forbids any service quality standard other than parity. While the Coalition does not concede that its proposal requires "superior" service, it does deny Qwest's assertion that the Commission lacks the authority to require such service.

Qwest notes that the 1996 Act does not require Qwest to provide CLECs with services of higher quality than it provides to its own retail operations, and that the FCC's effort to require companies to provide superior service quality was reversed by the courts.[44] But the Commission operates not merely pursuant to the 1996 Act, but also pursuant to state authority. Both Congress and the Minnesota Legislature contemplated the Commission exercising that authority over service quality. The federal Act provides for states to establish and enforce their own state law requirements, "including compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. § 252(e)(3). And Minnesota statute directs the Commission to prescribe standards for service quality,

[43]Minn. Stat. § 237.16, subd. 8(7). See *US WEST v. Minnesota PUC*, 55 Fed. Supp. 2d 968 (D. Minn. 1999) (noting that § 237.16, subd. 8 lists Commission powers).

[44] *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000), *cert. granted in part*, 121 S.Ct. 878 (2001).

> using any existing federal standards as minimum standards and incorporating any additional standards or requirements necessary to ensure the provision of high quality telephone service throughout the state.[45]

Qwest's argument has been previously considered and rejected. As early as 1997 the Commission adopted rules permitting a CLEC to demand wholesale services of superior quality.[46] The Minnesota Office of Administrative Hearings rejected US WEST's claims that this policy conflicts with the 1996 Act.[47] More recently the federal district court upheld the DMOQs, finding as follows:

> If the FCC rules were the MPUC's [the Commission's] sole basis for its authority, the MPUC might have exceeded its authority if it directed US West to provide superior service. However, the Act provides that a state commission can establish "other requirements of State law in its review of any agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. § 252(e)(3). It is appropriate for a state commission to implement its own state's laws during the review process so long as those laws do not conflict with or impede the federal act....
>
> Given the MPUC's implicit reliance on its own powers under state law, the question then becomes does Minnesota law provide the necessary authority for the MPUC to require provision of superior quality service? ....Based on its authority to issue orders concerning inadequate services, establish the terms for entry of new telephone service providers, and to ensure high quality telephone service, the MPUC has the necessary authority under state law to require US West to offer superior quality interconnection, if deemed necessary.[48]

The Commission concludes that the 1996 Act does not preclude states from regulating service quality, even when that regulation does not employ a parity standard.

3. Legal authority to require payments

Qwest also disputes the Commission's legal authority to require Qwest to make payments to competitors for failing to comply with service quality standards. The Coalition adopts the contrary view.

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[45] Minnesota Statutes § 237.16, subd. 8, cited with approval in *US WEST v. Minnesota PUC*, 55 Fed. Supp. 2d 968 (D. Minn. 1999).

[46] Minn. Rules part 7812.0700, subp. 3; see also part 7811.0700, subp. 3.

[47] *In the Matter of the Planned Promulgation of Rules Governing the Competitive Provision of Local Telecommunications Services in Areas Served by Local Telephone Companies With Less Than 50,000 Subscribers*, Docket No. P-999/R-97-608, Office of Administrative Hearings Docket No. 7-2500-11320-1, Report of the Administrative Law Judge (December 26, 1997), ¶ 26 (discussing Minn. Rules part 7811.0700, subp. 3).

[48] *US WEST v. Minnesota PUC*, 55 Fed. Supp. 2d 968 (D. Minn. 1999) (footnotes omitted).

Again, the federal district court upheld the Commission's authority to require such payments:

> US West also challenges the MPUC's authority to implement performance penalties....
>
> The MPUC's authority to implement performance penalties can be fairly implied from its power "to *ensure* the provision of high quality telephone services..." Minn. Stat. § 237.16, subd. 8 (emphasis added). As the MPUC noted, penalties are necessary to give meaningful effect to the quality standards in the [Interconnection] Agreements. (A168; Order Resolving Arbitration Issues at 57). Without the penalties, an incumbent LEC, in order to gain a competitive advantage, might be inclined to cause delay in the provision of quality services to CLECs and thereby hurt the end-customer. The penalty provision prevents this behavior and ensures that high quality service reaches the customer. Possessing the requisite authority under state law, the MPUC may, under § 252(e)(3), impose the quality standards and penalty provisions at issue.[49]

The Commission's experience with AFOR plans, DMOQs and the interim standards has demonstrated the practical necessity of payment schemes for implementing service quality standards in a competitive environment. The Commission concludes that it is not precluded from requiring payments as proposed by the Coalition.

4. Minnesota Statutes §§ 14.045 and 237.462

Finally, Qwest argues that the Commission's authority to require payments is constrained by Minnesota Statutes §§ 14.045 and 237.462.

Qwest argues that Minnesota Statutes § 14.045 limits the magnitude of payments that can be included in a wholesale service quality plan. Section 14.045, subdivision 1 reads as follows:

> Limit on penalties. An agency may not, under authority of rule, levy a total fine or penalty of more than $700 for a single violation unless the agency has specific statutory authority to levy a fine in excess of that amount.

This statute is codified in Minnesota's Administrative Procedure Act amid instructions for conducting administrative rulemakings. Because the Commission is acting pursuant to its statutory authority, not "under authority of rule," this statute is inapplicable.

The statute reflects the distinction between rulemakings and contested case proceedings. Rules represent agency decisions that are binding on parties regardless of their opportunity to participate in the decision. For example, Commission rules are binding on any new CLEC that might enter the state. Given this potentially harsh dynamic, the Legislature had cause to limit the power that can be wielded through rules. Contested case proceedings, in contrast, bind only the parties that have actual notice and opportunity to participate in them. Hence, the concerns that might prompt the Legislature to limit the force of a rule do not apply to contested cases, and such cases are not subject to § 14.045's restrictions. It is instructive to note that this statute did not preclude the court from upholding the Commission's authority to adopt DMOQs.[50]

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[49] *Id.*

[50] *Id.*

In the alternative, Qwest argues that Minnesota Statutes § 237.462 imposes limits on the amount of payments the Commission can require, and the circumstances under which the Commission may require them. Section 237.462, subdivision 1, states as follows:

> After a proceeding under section 237.081, the commission may issue an order administratively assessing monetary penalties for knowing and intentional violations of:
>
> (1) sections 237.09, 237.121, and 237.16 and any rules adopted under those sections;
>
> (2) any standards, limitations, or conditions established in a commission order pursuant to sections 237.09, 237.121, and;
>
> (3) an approved interconnection agreement if the violation is material; and
>
> (4) any duty or obligation of a telephone company, a telecommunications carrier, or a telecommunications provider imposed upon such telephone company, telecommunications carrier, or telecommunications provider by section 251, paragraph (a), (b), or (c) of the Telecommunications Act of 1996 that relates to service provided in the state.
>
> The penalty order must be issued as provided in this section.

Qwest's interpretation of this statute is unpersuasive for many reasons.

First, the statute's text does not support Qwest's interpretation. As the permissive verb "may" indicates, this statute does not constrain the Commission's authority, but augments it. Subdivision 9 clarifies this point, stating:

> The imposition of administrative penalties in accordance with this section is *in addition to* all other remedies available under statutory or common law. The payment of a penalty does not preclude the use of other enforcement provision, under which penalties are not assessed, in connection with the violation or violations for which the penalty was assessed.

(Emphasis added.) In contrast, Qwest's interpretation of the statute would produce absurd results. For example, subdivision 12 limits the statute's scope to carriers competing in the service area of large companies. Qwest's reading would suggest that the Legislature intended to limit the Commission's authority to fashion remedies, but only for competition occurring in the service area of large carriers; in the rest of the state, the Commission's authority would remain unconstrained. A more straightforward interpretation is that the Legislature intended to expand the Commission's authority to address competitive issues in the service areas of large carriers, where the most competition – and competitive problems – were developing.[51]

[51] This interpretation is also consistent with the statute's legislative history. The statute's language was derived from Qwest's AFOR plan. See AFOR plan at 32-34 ("Competitive Enforcement"). Only after the AFOR plan was finalized in January 1999 did the Legislature adopt a modified version into statute, modeled on Minn. Stat. § 14.045. See Laws of Minnesota 1999, ch. 224 § 2.

Second, the service quality standards do not require "penalties" – that is, sanctions payable to the state – but instead require payments to injured parties. Consequently, the limitations of § 237.462 do not apply to this docket.

Most significantly, however, the Commission has pursued the current docket under authority granted by a number of statutes, not merely § 237.081, so the limitations of this one statute would not be controlling in any event.

Minnesota Statutes, and cases interpreting those statutes, demonstrate the Commission's broad authority to fashion standards and remedies to promote high quality telephone service and the emergence of a competitive telecommunications market. Nothing in the 1996 Act appears to preempt that authority. Consequently, the Commission is persuaded that it is authorized to adopt wholesale service quality standards that require more than a parity standard, and that require payments to affected parties.

B. Benchmarks vs. Parity

The choice between the PAP and the Coalition proposal largely reflects the choice between using, for a few sensitive measures, a parity standard or a benchmark standard. Upon analysis, the Commission concludes that the Coalition's proposals represent a better fit with the Commission's statutory directives.

1. Nondiscriminatory service vs. high quality service

Qwest argues that a parity standard is all that is necessary to ensure nondiscriminatory service. The Coalition argues that nondiscriminatory service is a necessary, but not sufficient, basis for competition. The Coalition asks the Commission to ensure high quality service as well.

The Commission agrees. A parity standard, whatever its other merits, does not fulfill the Commission's statutory charge to ensure the provision of high quality telecommunications service. Parity with poor performance is still poor performance.[52]

2. Competitive neutrality

Qwest emphasizes the merit of a parity standard to ensure competitive neutrality and preclude anti-competitive conduct in the local telephone market. The Coalition disputes these claims.

First, the Coalition observes that a parity standard maintains a fundamental inequality: one participant in the competitive market gets to determine the service quality standard for all the others. A benchmark standard, in contrast, limits the discretion any carrier has to influence the service quality enjoyed by another carrier.

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[52] *In the Matter of Illinois Bell Telephone Company v. AT&T*, 4 FCC Rcd No. 22 (October 20, 1989).

Second, whereas an incumbent monopolist acquired its customers by default, the Coalition notes that competitors must persuade customers to change their service provider.[53] One aspect of that persuasion is building a public reputation that inspires confidence among potential customers. At this early stage of competition, however, a CLEC's reputation is quite fragile. Due to Qwest's status as the incumbent monopolist, most customers have had years of experience with Qwest and have formed an opinion of that company and its service; occasional fluctuations in service quality are unlikely to change that opinion much. In contrast, most customers have had little experience with CLECs in general, let alone any specific CLEC in particular. A missed installation or a blocked line may create the critical first impression that a customer has of a new provider. According to the Coalition, that often becomes the last impression as well.

Finally, there may be structural reasons to suspect that the average Qwest customer differs from the average CLEC customer. Customers have varying interest in phone service. People who are especially concerned with quality may opt to take service from either the incumbent or from a competitor. But people who have less interest in phone matters are likely simply to maintain their status quo – typically, that means remaining with the incumbent. As a result, competitors may end up serving a disproportionate share of people who are sensitive to service quality, while the incumbent may end up serving a disproportionate share of people who are less sensitive to telecommunications matters.

Under this scenario, fluctuations in service quality – even fluctuations that apply to competitor and incumbent alike – have a more deleterious effect on competitors' customers than on the incumbent's customers. Because competitors also have a disproportionate share of customers that have demonstrated a willingness to change local phone providers, this effect on their customers may have a deleterious effect on the competitors as well.

The Commission concludes that a parity standard, whatever its other merits, is not competitively neutral.

Qwest argues that the benchmark standard is not competitively neutral either. Benchmarks permit CLECs to advertise higher quality services than Qwest provides its own customers, and the payments permit CLECs to compensate inconvenienced customers with Qwest's funds. And the Coalition's proposal shifts the burden of maintaining facilities inventories from CLECs onto Qwest.

The Commission is not persuaded. While the AFOR plan prohibits Qwest from degrading its retail service quality, nothing in the Coalition proposal would bar Qwest from enhancing its retail service quality. Qwest has always had the opportunity to make service offers to its retail customers including payments for non-compliance with promises. Qwest still retains that opportunity.

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[53] See *In the Matter of a Commission Investigation into the Issues Raised by New Access Communications Regarding the Application of Qwest's Avoided Cost Discount to its Win Back Tariff*, Docket No. P-421/CI-02-582 ORDER REJECTING WIN BACK TARIFF (December 20, 2002) at 6-8.

Nor does the Commission understand Qwest's suggestion that CLECs would gain a competitive advantage if Qwest were subject to service quality standards and had to make payments for non-compliance. First, no party has greater control over Qwest's service quality than Qwest; if Qwest wants to provide increased service quality to its own retail customers, it has the discretion to do so. Moreover, Qwest's retail services have long been the object of benchmark standards and payment requirements under Qwest's AFOR plan. If these arrangements in fact create some kind of competitive advantage, then Qwest has been the beneficiary of them. The Coalition's proposal should tend to enhance competitive neutrality by "leveling the playing field."

Finally, the Coalition has noted that Qwest's inventory costs are already reflected in its cost of providing wholesale services to CLECs. The issue of Qwest's cost recovery is addressed further below.

The Commission finds that the proposed benchmark standards are consistent with competitive neutrality.

3. Promotion of a competitive market

The Coalition notes that the Commission has the responsibility to promote the development of a competitive local service market. The Coalition not only denies that a parity standard is competitively neutral, but argues that having a predictable level of service quality is necessary to the development of a competitive market.

To win a customer, a CLEC must be able to do more than simply inspire confidence: it must be able to tell a customer what he or she can expect from the new provider. In the absence of benchmarks, competitors are deprived of fundamental information with which to make their pitch. High quality service is desirable, according to the Coalition, but predictable service is crucial.

The Commission agrees. As the Commission remarked when approving the DMOQs, "Specificity serves the interest of end users directly by establishing clear benchmarks of quality consumers can expect from each provider."[54] A parity standard simply leaves too much uncertainty about the quality of services to permit the growth of competition. For competition to thrive, CLECs must have access to wholesale services of stable, predictable quality. That is what a benchmark standard is designed to provide. The parity standard is not.

C. Merit of Coalition's benchmarks

In making its benchmark proposal, the Coalition selected standards that largely coincided with service quality standards arising from other documents. These standards are familiar and have proven workable in the past. The Commission finds these standards well within the range of reasonableness.

D. Payments

Qwest argues that the record of this case does not support requiring Qwest to make payments for failing to provide wholesale services in conformance with a Commission-approved standard. The

[54] DMOQ at 56.

Coalition disagrees, noting that the Commission has previously concluded that payments are appropriate to give meaningful effect to service quality standards.[55]

The Commission has previously ruled on the merits of the PAP, including its payment schedule, for the purpose of ensuring that Qwest would not offer CLECs service of lower quality than it offers to its own retail operations. The fact that Qwest has embraced the PAP and voluntarily incorporated it into its 271 Application bolsters the Commission's faith in the reasonableness of that plan for that purpose.

The current docket is designed to develop standards to promote high quality service and enhance local competition. In the interest of simplicity the Commission invited parties to use the PAP as a framework for a wholesale service quality plan, and all parties complied. Qwest recommends adopting the PAP in its entirety whereas the Coalition recommends changes to tailor the plan to the purpose of the current docket. In neither case did a party propose increasing the payment schedules. Given that those payments are designed to be in the nature of stipulated damages,[56] the Commission is satisfied that they are not excessive.

E. Miscellaneous changes

The Coalition also proposes miscellaneous other changes. These changes, and their rationale, are summarized below:

- The Coalition proposes reinstating a limit on Qwest's aggregate liability under the wholesale service plan, matching the $100 million limit in the PAP. The Coalition also proposes retaining the payment schedules from the PAP. But the Coalition proposes increasing the cap on billing measure liability. The Commission finds this modification reasonable as a means of preventing a potential manipulation of those caps.

- The Coalition proposes to adopt a Qwest proposal to remove references to the Tier 2 Fund, and to specify that Qwest need not file information under the wholesale service quality plan that it was already filing under the PAP. The Commission finds these modifications a reasonable accommodation to administrative simplicity.

- The Coalition proposes to clarify that CLECs may pursue remedies beyond those provided in the service quality plan, but may not obtain duplicative recoveries. The Commission approves of this policy, and finds that Coalition's proposed language reflects it.

- The Coalition proposes to eliminate language requiring the losing party to pay the attorneys' fees under some circumstances. Given the concerns expressed by Coalition members and the flexibility expressed by Qwest, the Commission finds this change reasonable.

- The Coalition proposes other ministerial changes. The Commission finds these changes reasonable as well.

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[55] *Id.* at 57.

[56] PAP ¶ 16.6.

In sum, the Commission concurs with the Coalition, and occasionally also with Qwest, that these proposed changes are reasonable and will facilitate a smooth implementation of the service quality plan.

V. Commission action

In a monopolistic environment, people have two choices: take the service the monopolist offers, or do without. Regulating a monopoly does not solve this problem; it merely softens the consequences of this lack of choice by taking some of the control away from the monopolist and placing it under public control. In the absence of wholesale service quality standards such as the DMOQs or the interim measures, Qwest would have broad discretion regarding the quality of service it provided to CLECs, constrained only by its duty not to discriminate. On behalf of all retail service providers in Minnesota and their customers, the Commission will now establish permanent standards for Qwest's wholesale services.

There is no "right" or "wrong" level of service quality, discernible through the rigorous application of judicial analysis. Rather, the appropriate level of service quality is a legislative question to be resolved through the exercise of prudent judgment in the balancing of competing interests.

After years of proceedings, the parties present two alternatives for the Commission's consideration. The parties agree on more than they disagree, but differences remain. The Coalition's proposal places a greater emphasis on fixed benchmarks as a standard for gauging service quality. Qwest's proposal relies more heavily on a flexible parity standard.

The Commission considers these alternatives from the perspective of its statutory duties. In particular, the Commission has the duty to promote high quality service and the development of competitive local phone markets. The Commission's analysis leads to the following conclusions:

- Certain PIDs, identified by the Coalition, have a peculiarly strong influence on service quality, and on the promotion of competition. Consequently, those PIDs warrant special consideration in the development of service quality standards.

- Parity standards are not designed to ensure high quality service. Benchmark standards are.

- Parity standards can potentially impede the development of competitive markets because they are not always competitively neutral. They place one actor in a competitive market in a position to influence the service quality provided to all other competitors. And, because competitors may have different sensitivities to service quality fluctuations, a standard that permits fluctuations may affect carriers in an unequal way. Benchmark standards improve predictability and reduce the influence that any competitor can wield over any other.

- Parity standards can impede the development of a competitive market because they deprive competitors of the fundamental information that they need to sell their products. A benchmark standard provides that information.

- The benchmarks proposed by the Coalition are reasonable.

- Payment schemes are necessary to enforce standards. The proposed payment scheme, having been designed as a system of stipulated damages, is reasonable.

- Beyond the benchmark proposals, the Coalition's other miscellaneous changes are reasonable and consistent with the Commission's statutory objectives.

For all the reasons addressed above, the Commission will adopt the Coalition proposal.

Finally, a word about cost recovery: Today the Commission adopts standards for Qwest's wholesale services and network elements. While the Commission did not adopt Qwest's preferred plan, Qwest is not without recourse. A utility is entitled to receive compensation equal to the amount a prudently-managed company would require under similar circumstances.[57] If, as Qwest suggests, it lacks adequate compensation to cover the cost of complying with this Order, Qwest may pursue administrative remedies to adjust its rates for wholesale services, retail services, or both, to reflect its new costs. Those proceedings, if necessary, will provide the appropriate forum to address issues regarding cost recovery.

ORDER

1. The Coalition's wholesale service quality plan as filed with modifications on May 5, 2003, is adopted. The Coalition shall file a clean copy with the Commission.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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[57] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602-05 (1944).